RECORD AND BRIEFS

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In The Supreme Court Of The United States

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

PETITIONER,

v.

ANZ SECURITIES, INC., ET AL.,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMICUS BRIEF OF THE STATES OF WASHINGTON, ALASKA, CONNECTICUT, HAWAI'I, IOWA, MARYLAND, MICHIGAN, MISSISSIPPI, OREGON, AND VIRGINIA IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974), has governed class action jurisprudence for decades. Under the *American Pipe* rule, a class action complaint "suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id.* at 552-53. Until the recent Second Circuit decision in *Police & Fire Retirement System of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013), *cert. granted sub nom., Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, 134 S. Ct. 1515 (2014), *cert. dismissed as improvidently granted*, 135 S. Ct. 42 (2014), the States relied upon *American Pipe* to toll the limitations periods for actions under the Securities Act. The Second Circuit again has rejected the *American Pipe* rule in this case, holding that the "statute of repose" in the Securities Act is not tolled. Its decision deepens an existing circuit split and adversely affects the States' efforts to protect the investment of trust and public funds.

This amicus brief addresses the first Question Presented by Petitioner:

> Does the filing of a putative class action serve, under the *American Pipe* rule, to satisfy the three-year time limitation in Section 13 of the Securities Act with respect to the claims of putative class members?

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INTEREST OF AMICI CURIAE

Amici States invest billions of dollars of pension funds on behalf of public employees, including teachers and other school employees, law enforcement officers, firefighters, and judges. The States also invest funds that support many public purposes, including public schools, colleges and universities, injured workers, and developmentally disabled persons. Further, state sovereign wealth funds, such as Alaska's Permanent Fund, invest the accumulated proceeds of natural resource extraction for the direct benefit of state residents and to support government operations.

States manage these funds for beneficiaries and the public under various legal principles, including fiduciary principles. In their role as fund managers, the States file and participate in securities litigation, acting as lead plaintiffs in meritorious litigation across the nation. State Attorneys General are on the front lines of recovering lost assets, exposing financial fraud, demanding accountability, and otherwise protecting public funds. States have a vital interest in the petition before this Court to ensure access to justice, to deter corporate abuse, and to efficiently recover lost funds for the benefit of the public and beneficiaries alike.

REASONS FOR GRANTING THE PETITION

The States have relied on the *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), rule for decades in situations similar to the present case. The Second Circuit continues to depart from that decision and deepens the conflict among the Circuits.

The Petitioner, California Public Employees' Retirement System (CalPERS), ably describes the legal errors and circuit conflicts. Rather than reiterate that brief, the amici States seek to highlight how the Second Circuit's decisions impose unnecessary and costly burdens on the States and prompt wasteful and unnecessary litigation that burdens all parties and the courts.

A. The Second Circuit's Decision Creates Barriers That Affect the States' Vital Interest in Access to Justice

By rejecting the *American Pipe* rule, the Second Circuit decision harms the States, imposing duties that needlessly burden the recovery of lost assets for beneficiaries and the public. States, through designated agencies, act as trustees or have trustee-like duties over the assets they manage. As fiduciaries, the States have a duty to take reasonable steps to enforce claims associated with assets they manage. *Restatement (Second) of Trusts* § 177 (1959). *American Pipe* plays a critical role in aiding the States to efficiently manage their fiduciary responsibilities.

Under *American Pipe*, the filing of a class action complaint temporarily suspends applicable statutes of limitation for all class members "who would have been parties had the suit been permitted to continue as a class action." *American Pipe*, 414 U.S. at 554. It creates a consistent rule of law, recognizing both the practicality and the necessity of tolling a limitation period to protect the rights of class members and to promote the efficiency and economy of class action litigation. *Id.* at 553-56.

The Second Circuit's decisions in this case and in *Police & Fire Retirement System of City of Detroit v. IndyMac MBS, Inc. (IndyMac)*, 721 F.3d 95 (2d Cir. 2013), have turned the tables in a circuit that adjudicates a significant number of securities cases. No longer is tolling available to protect putative class member claims facing a statute of repose. *IndyMac*, 721 F.3d at 109. In its wake is a rule that shifts the paradigm of burdens and responsibilities.

Before the Second Circuit's decision in *IndyMac*, the States could rely on representations in pleadings knowing that their interests were protected by tolling should a claim later be dismissed. *See, e.g., Joseph v. Wiles*, 223 F.3d 1155, 1166-67 (10th Cir. 2000). The Second Circuit's decisions in the Petition before the Court and *IndyMac* stripped away such reliance. It shifts onto the States an unreasonable burden of evaluating the veracity of the pleadings and the foundations of claims to predict the risk of a dismissal or a class certification failure. States must evaluate these risks to determine if the litigation protects their interests in light of the unavoidable uncertainty as to how the trial judge ultimately will rule on certification and dismissal. It further impairs the States' ability to opt out of litigation absent the effective monitoring of limitation periods. This increased uncertainty and the heightened diligence impose a significant and unnecessary burden on governments that already face budgetary constraints and competing demands for resources.

IndyMac itself shows why the States can no longer rely on a plaintiff's pleadings. *IndyMac*, 721 F.3d at 112-13. *IndyMac* involved two class actions

in which the District Court consolidated and appointed the Wyoming Treasurer and Wyoming employee pension fund (Wyoming) as the class representative. *Id.* at 102-03. Wyoming then filed an amended consolidated complaint on behalf of other putative class members, asserting claims covering 106 different offerings. *In re IndyMac Mortgage-Backed Sec. Litig. (In re IndyMac)*, 718 F. Supp. 2d 495, 501 (S.D.N.Y. 2010). On the face of the consolidated complaints, class members believed that their claims were included in allegations before the court. The complaint listed the different offerings, the claims, and the theories of liability that established the preliminary scope of the proposed class. *IndyMac*, 721 F.3d at 102.

A dismissal motion by the defendants, filed after the one-year limitation period in Section 13 of the Securities Act (15 U.S.C. § 77m (1933)), showed that Wyoming purchased only 15 of the 106 offerings listed in its amended complaint. *In re IndyMac*, 718 F. Supp. 2d at 501. The trial court found that Wyoming lacked standing to assert claims for securities offerings it had not purchased, and the court dismissed all those claims. *Id.*

Upon learning that the appointed class representative did not purchase the majority of securities pled in the amended complaint, several state and city entities moved to intervene, relying on the *American Pipe* rule. *IndyMac*, 721 F.3d at 103. The court denied the intervenor motions, finding that *American Pipe* did not toll those claims. *Id.* at 109. Without the protection of tolling, the intervenors could not rely on the pleadings and lost their ability to pursue their claims.

The inability to rely on pleadings places the States at a distinct disadvantage. Third parties, not the States, often have knowledge of facts that create a risk of dismissal. These facts often become known only in the later stages of the litigation when dismissal and class certification motions are filed and after the "statute of repose" in Section 13 has run. In that common situation, by the time motions are filed and merits determined, it is too late to protect the public's interest with the benefit of tolling.

That situation is made common by the inherent complexity of securities litigation. It involves multiple parties, facts and legal theories. Any particular case involves risks associated with numerous theories and defenses. Defenses may include safe harbor rules, reliance, lack of class commonality or typicality as well as pleading defects affecting claims or standing. Analyzing and deciphering these factors to weigh the risks associated with a particular litigation is a substantial burden with a significant risk of error, as evidenced in *IndyMac*. By rejecting the *American Pipe* rule, the Second Circuit requires States and other putative class members to bear that risk—or, as discussed below, to respond to that risk by initiating wasteful, duplicative litigation to protect their ability to pursue meritorious claims.

The case before this Court further highlights the additional burdens shifted onto the States by the Second Circuit. Under Federal Rule of Civil Procedure 23(c)(2)(B), class members may participate or withdraw from a class action until they receive notice of the opt-out deadline. *American Pipe*, 414

U.S. at 549. CalPERS never received an opt-out notice, relying on the assurance of Fed. R. Civ. P. 23(c) that a class member may opt out before the exclusion deadline. When CalPERS filed an individual action, the district court dismissed its claims as untimely and the Second Circuit affirmed. *In re Lehman Bros. Sec. & ERISA Litig.*, No. 15-879, 2016 WL 3648259 (2d Cir. July 8, 2016).

Without the protections of Fed. R. Civ. P. 23 and tolling, the Second Circuit's decisions shift onto the States the monitoring of each and every limitation period in every class action in which it may be a putative member, which is contrary to the purposes of the rule. Fed. R. Civ. P. 23 was designed to remedy the practical obstacles and burdens of class action litigation. *See American Pipe*, 414 U.S. at 550. Before *American Pipe*, many courts required class members to show that the limitation period was satisfied on an individual basis. *Id.* Noting the difficulties and unfairness associated with such a requirement, *American Pipe* relieved class members from the burden and disadvantage of evaluating the claims of a class representative and monitoring limitation periods: "Not until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case." *Id.* at 552. The Second Circuit shifts onto the States the very obligations previously mitigated by *American Pipe*.

The sheer number of cases filed each year further amplifies the States' burden, especially if States must monitor and evaluate the pleadings and

progress in each case, rather than rely on *American Pipe*. An average of 188 new securities class actions are filed each year. Cornerstone Research, *Securities Class Action Filings, 2015 Year in Review*, at 4, https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2015-Year-in-Review.pdf (10-year average); *see* NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review*, http://www.nera.com/publications.html#tab-2. The resources needed to evaluate that number of potentially relevant cases places an unnecessary and heavy burden on the States, creating the same harm that Fed. R. Civ. P. 23 sought to prevent. Untethered from necessity, practicality, efficiency, and this Court's precedent, the Second Circuit has increased cost, complexity, and risk for States seeking to responsibly invest, manage, and protect beneficiary and public funds entrusted to them.

B. The Second Circuit Decision Compels the Filing of Duplicative Litigation to Prevent Claims From Being Time-Barred

One way for States to protect the public and beneficiaries from time-barred claims in meritorious cases is to file duplicative litigation. Such an approach, however, runs further astray from the purposes of Fed. R. Civ. P. 23 and substantially increases the overall cost of litigation for the States, the defendants, and the courts.

As the Petition and *IndyMac* demonstrate, the risk of barred claims is significant. Resolutions of issues involving the adequacy, appropriateness, and scope of class representation can be delayed by the

timing of the lawsuit filing, the complexity of the issues, and the motions filed by each party. *See, e.g.*, *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008); *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006); *Int'l Fund Mgmt. S.A. v. Citigroup, Inc.*, 822 F. Supp. 2d 368, 380 (S.D.N.Y. 2011). Delays create significant risks for putative class members, risks that weigh heavily on States tasked with the responsibility of protecting public and beneficiary funds from losses.

A rational response to these risks is to initiate parallel actions or to file motions to intervene in meritorious cases. Although these options mitigate the risk of time-barred claims, they are not without cost. Depositions, document production, and written discovery in these complex cases require significant allocations of public resources.

The devotion of resources and increased costs fall not only on the putative class members that choose to litigate to protect their meritorious claims, but also on the courts and the defendants who must respond in parallel suits. Duplicative litigation wastes judicial resources and adversely affects the efficiencies associated with Fed. R. Civ. P. 23.

Fed. R. Civ. P. 23 was designed to create an aggregative approach to securities litigation. *Civil Procedure – Class Actions – Second Circuit Holds that American Pipe Class Action Tolling Doctrine Does Not Apply to Statute of Repose in Securities Act of 1933 – Police & Fire Retirement System of Detroit v. IndyMac MBS*, Inc., *721 F.3d 95 (2d Cir. 2013)*, 127 Harv. L. Rev. 1501, 1507 (Mar. 2014). A purpose of Fed. R. Civ. P. 23 "[wa]s to funnel as many claims

as possible arising out of a given fraud into a single action managed by a single institutional-investor plaintiff and litigated by a single law firm." *Id.* at 1508. *American Pipe* promoted this purpose. *American Pipe*, 414 U.S. at 550-552. Putative class members were incentivized to await resolution because claims were protected until class certification was resolved or the opt-out deadline passed. *Id.* at 552.

Rather than encouraging the efficient aggregation and resolution of claims, the Second Circuit decision encourages the filing of additional litigation. It incentivizes putative class members to file motions to intervene to protect a class of claims from dismissal while incentivizing others with large claims to file separate litigation to protect opt-out rights.

The Second Circuit's decision also distorts Fed. R. Civ. P. 23 by nullifying the effect and purpose of an opt-out notice. An opt-out notice was designed to preserve the rights of potential class members when interests are in conflict or antagonistic to other class members.[1] *E.g.*, 7A Charles Alan Wright, et al., *Federal Practice and Procedure* § 1787, at 518 (4th ed. 2010). An opt-out notice received after the

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[1] Securities litigation cases are most often certified by the Court under Fed. R. Civ. P. 23(b)(3), which requires an opt-out notice. Fed. R. Civ. P. 23(c)(2)(B). Opt-out notices also may be required under Fed. R. Civ. P. 23(a)(1) and (2) by virtue of the Due Process Clause for claims primarily for money judgments. Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 Colum. L. Rev. 599, 602 (Apr. 2015) (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011)).

limitation period expires, however, is pointless. There is no opt-out right if it does not give putative class members a meaningful right to pursue claims independently. An opt-out notice after the limitation period expires confers only the right to receive "something" by staying in the class or receiving "nothing" by opting-out. Facing the option of "something" or "nothing," a putative class member with significant damages is better off filing separate, duplicative litigation early in the case to protect its rights and to avoid the claim preclusion effect of the litigation.

If separate litigation or intervention is incentivized, the purposes of Fed. R. Civ. P. 23 are thwarted. The *American Pipe* rule, on the other hand, provides balance that protects the interests of class representatives and class members while promoting efficient administration of justice. *American Pipe*, 414 U.S. at 552-55. Because the Second Circuit's decision conflicts with *American Pipe* and disregards Fed. R. Civ. P. 23's purposes, this Court should grant certiorari and reverse the decision.

C. The Second Circuit Decision Impedes Public Access to Justice

Class action litigation is recognized as an effective and efficient means of allowing access to justice for those with small monetary claims that would otherwise not be pursued:

> "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action

> prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

Although the Second Circuit's decisions incentivize large, sophisticated investors to protect their claims by filing separate, duplicative litigation, small investors with similar claims are left unprotected. Small investors typically lack the means to protect their investments. Millions of shareholders hold securities in brokerage accounts throughout the nation. Millions more hold securities in personal 401(k), deferred compensation, and other pension funds. The States have a fundamental interest in ensuring that holders of small claims have a pathway to justice.

Small claim holders will be denied access to justice because the economics do not justify protective litigation, and because they lack the means to monitor or intervene in litigation that affects their claims. Importantly, even large investors like States may hold relatively small investments as part of their diversified portfolios, placing them in the same position as small claimants in securities litigation. Access to the courts will be lost not just to the States, which hold such small claims, but also to those most affected by the loss, the public.

The *American Pipe* rule helps protect access to the courts for small claims in securities litigation. Granting certiorari and reversing the Second Circuit's decision in this case will help maintain a fair and efficient process that allows small claim holders a pathway to adjudicate meritorious claims.

CONCLUSION

The Court should grant the petition for writ of certiorari. The issue of tolling is ripe for review and presents an issue of importance to the States who are entrusted with beneficiary and taxpayer dollars.

RESPECTFULLY SUBMITTED.

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